No. 87-353

Supreme Court, U.S.
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CLERK

In The Supreme Court Of The United States

October Term, 1987

REATHER P. ARNOLD,

Petitioner,

v.

SOUTH CAROLINA PUBLIC SERVICE AUTHORITY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

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QUESTION PRESENTED

Is it a violation of the constitutional obligation to pay "just compensation," to hold that the value of property taken in condemnation cannot be valued in combination with adjoining lands without unity of ownership?

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PETITION FOR WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

Reather P. Arnold, Petitioner, prays that a Writ of Certiorari issue to review the decision of the South Carolina Supreme Court, filed April 27, 1987, in this proceeding.

OPINION BELOW

The opinion of the South Carolina Supreme Court initially reported at 356 S.E.2d 837 (1987) appears in Appendix A hereto.

A timely petition for rehearing was filed in the Supreme Court and was denied without modification of the opinion. (Appendix B)

JURISDICTION

The order of the South Carolina Supreme Court denying rehearing of the Supreme Court decision was filed on June 2, 1987. This petition for a writ of certiorari is filed within ninety days of that date. This court's jurisdiction is invoked under Title 28 U.S.C. Section 1257(3).

STATEMENT OF THE CASE

This is a condemnation case

instituted by the South Carolina Public Service Authority for the purpose of establishing an electric transmission line easement across the landowner's property.

The property is one of six (6) tracts of land that have been owned by members of the same family and used as a unit, that were consolidated for an earlier trial regarding the same condemnation. The South Carolina Supreme Court reversed this prior judgment on procedural grounds concerning consolidation and sent the cases back for separate trials at S.C. Public Service Authority v. Reather P. Arnold, et al, 287 S.C. 581, 340 S.E.2d 535 (1985).

The instant case was the first case, of the six remanded for trial, and was tried on April 7, 1986. Prior to and at trial, the trial court ruled that

testimony or evidence with respect to combining the several tracts for determining highest and best use, specifically to make it economically feasible to establish a limestone mining quarry, was not admissible.

Notice of intent to appeal was timely taken, with reference to the trial Court's ruling and from the jury verdict. That appeal was decided by the South Carolina Supreme Court on April 27, 1987 (Appendix A). On May 6, 1987 Petitioner filed a Petition for Rehearing in the South Carolina Supreme Court. The South Carolina Supreme Court denied the Petition of Rehearing filed June 2, 1987 (Appendix B).

STATEMENT OF THE FACTS

The South Carolina Public Service Authority instituted a condemnation action for purpose of

establishing an electric transmission line easement across tracts of land owned by six brothers and sisters in Berkeley County, South Carolina. The six tracts have been owned by them since 1948 and were previously owned as one tract by their father. The father allocated the lands to his children prior to his death. The Petitioner, Reather P. Arnold, owns one of these tracts.

Since they have owned the lands, the landowners have used the separate tracts as a unit and have sold their timber as a unit for the past thirty or more years. In 1951, the landowners found that underlying their lands was a deposit of limestone and since 1971 have planned to sell the lands together as a quarry site when they were able to obtain a reasonable and profitable price for such an opera-

tion. The first trial court, prior to remand for separate trials, found that there was such a reasonable probability of a combination of the lands for the use as a limestone quarry as to allow the consideration of the lands as having limestone deposits in combination with other tracts. The first trial Court also found that before the take a limestone quarry would have been an economically feasible operation on the six (6) tracts. It is undisputed that such an operation would not be economically feasible on Petitioner's tract alone.

The South Carolina Supreme Court reversed the prior trial court's ruling, based upon a procedural ruling concerning consolidation and remanded all six cases to be tried separately. Petitioner's case was the first to be heard and she was denied the right to

introduce any evidence concerning combining the six tracts for determining their highest and best use.

REASON FOR GRANTING THE WRIT

TO HOLD THE VALUE OF PROPERTY TAKEN IN CONDEMNATION CANNOT BE VALUED IN COMBINATION WITH ADJOINING LANDS WITHOUT UNITY OF OWNERSHIP, NECESSARILY VIOLATES THE CONSTITUTIONAL OBLIGATION TO PAY "JUST COMPENSATION."

The Fifth Amendment mandates that when private property is taken for public use that the owner of the condemned property receive "just compensation." In order for Petitioner to receive "just compensation," she must be paid upon the highest and most profitable use for which the property is reasonably adaptable. E.g., U.S. v. 531.10, Acres in Anderson County, S.C., 243 F.Supp. 981 (1965).

At trial, Petitioner was denied the right to introduce evidence of the value of her tract if used as a limestone quarry in common with the five adjoining parcels owned by her brothers and sisters. It is undisputed that Petitioner's tract alone could not be used to extract limestone and that the Respondents powerline easement crosses all six parcels. It is also undisputed that before the take, a limestone quarry would have been an economically feasible operation on the six (6) tracts combined.

The question before the court today is a question of "just compensation" as required by the 5th Amendment to the Constitution of the United States.

The recent decision of this Court of English Evangelical Lutheran

Church of Glendale v. Los Angeles County, ___ U.S. ___, 107 S.Ct. 2378 (1987), explained the "just compensation" requirement as follows:

> Consideration of the compensation question must begin with direct reference to the language of the Fifth Amendment, which provides in relevant part that 'private property [shall not] be taken for public use, without just compensation.' Id. at ____, 107 S.Ct. at 2385...The basic understanding of the Amendment makes clear that it is designed not to limit the governmental inter-ference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking. Thus, government action that works a taking of property rights necessarily implicates the 'constitutional obligation to pay just compensation.' Id. at ___, 107 S. Ct. at 2385-86. (quoting Armstrong v. U.S., 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960)).

The Supreme Court of South Carolina failed to recognize the guiding principle in determining "just compensation" as set forth by this Court in Olson v. United States, 292 U.S. 246, 54 S.Ct. 704, 78 L. Ed. 1236 (1934):

> Just compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined. The sum required to be paid the owner does not depend upon the uses to which he has devoted his land but is to be arrived at upon just consideration of all the uses for which it is suitable. The highest and most profitable use of which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held. Boom Co. v. Peterson, 98 U.S. 403, 408. Clark's Ferry Bridge Co. v. Public Service Comm.'s, 291 U.S. 227, 2 Lewis, Eminent Domain 3d

> ed. §707, p. 1233. 1 Nichols, Eminent Domain, 2d ed., §220, p. 671. The fact that the most profitable use of a parcel can be made only in combination with other lands does not necessarily exclude that use from consideration if the possibility of combination is reasonably sufficient to affect market value. (Emphasis added).

Id. at 255-56, 54 S.Ct. at 708-09. See also, U.S. v. Fuller, 409 U.S. 488, 93 S.Ct. 801 (1973).

The Supreme Court of South Carolina, before the instant case, applied the reasoning of the Court in Olson in deciding City of Orangeburg v. Buford, 227 S.C. 280, 87 S.E.2d 822 (1955) which stated:

> The landowner was entitled to compensation upon the basis of most advantageous and profitable use of her land. In estimating the value of property condemned, all of the uses to which it may be applied, or for which it is adapted, which affect its value in the market, are

> to be considered, and not merely the condition it is in at the time and the use to which it was then applied by the owner. Nathahala Power & Light Co. v. Moss, 220 N.C. 200, 17 S.E.2d 10; 18 Am Jur., Eminent Domain, Section 244. It is true that the improvements on the property condemned were to be made in conjunction with those on adjacent property but 'the fact that the most profitable use of a parcel can be made only in combination with other lands does not necessarily exclude that use from consideration if the possibility of combination is reasonably sufficient to affect market value.' Olson v. United States, 292 U.S. 246, 54 S. Ct. 704, 709 78 L.Ed. 1236. (Emphasis added).

Id. at 285, 87 S.E.2d at 825.

The Supreme Court of South Carolina, in affirming the trial court's decision in this case, relied on Lewis v. South Carolina State Highway Dept., 278 S.C. 170, 293 S.E.2d 434 (1982) and South Carolina Highway Dept. v. Terrain,

276 S.C. 186, 227 S.E.2d 184 (1976) which held that different parcels may be combined to determine severance damages after a taking only if the parcels are united in ownership, physical proximity and use. The Court then ruled that no unity of ownership existed, and therefore the adjoining parcels of land could not be taken into consideration for the purpose of determining compensation. Simply stated, before a particular piece of land can qualify for severance damages (dollars), its relation to the land taken must be such as to meet the united in ownership, physical proximity, and use test. In this case, the Supreme Court of South Carolina confused the issue of valuing land in conjunction with other land to determine each parcel's highest and best use with the issue of what constitutes a tract for

purposes of determining to which land severance damages apply. The court failed to recognize that the application of unity of ownership only applies when there is an attempt to apply severance damages to more than one tract of land. Under the Constitutional requirement of "just compensation," unity of ownership can not apply to the valuation of the land taken. In the case of the land taken, in order for the landowner to receive "just compensation," as required by the Fifth Amendment, he must be compensated upon the basis of the most advantageous and profitable use of his land, to include valuation in combination with other lands.

CONCLUSION

The South Carolina Supreme Court decision affirming the trial judge's disallowance of evidence as to

the value of the condemned tract if used in combination with adjoining tracts, had the effect of overruling its own prior decision and is in variance with the decisions of this Court. This evidentiary ruling denies Petitioner the right to "just compensation" for her land.

For all of the above reasons, the Petition for Writ of Certiorari should be granted.

A. Camden Lewis
Keith M. Babcock
LEWIS, BABCOCK, PLEICONES
& HAWKINS

R. Markeley Dennis, Sr.
Dennis & Dennis

Attorneys for Petitioner

(Appendices follow)

FILING AND MAILING CERTIFICATE

I, Barbara E. Grove, hereby certify that on this 28th day of August, 1987, I filed with the Clerk's Office of the Supreme Court of the United States the foregoing Petition for a Writ of Certiorari and further certify that I mailed this same date the required copies to the opposing counsel listed below:

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APPENDIX A

Reather P. Arnold,

Appellant,

v.

South Carolina Public Service Authority,

Respondent.

No. 22711.

Supreme Court of South Carolina.

Heard March 24, 1987.

Decided April 27, 1987.

Public Service Authority brought condemnation action to establish power line easement over tract of land. The Court of Common Pleas, Berkeley County, Frank P. McGowan, Jr., J., disallowed evidence of value of condemnee's tract if used as limestone quarry in common with adjoining parcels owned by her brothers and sisters, and condemnee appealed. The Supreme Court, Gregory, J., held that adjoining parcels

could not be combined for purpose of increasing compensation for land taken, as parcels lack unity of ownership.

Affirmed.

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Adjoining parcels owned by condemnee and her brothers and sisters could not be combined for purpose of increasing compensation for land taken in condemnation proceedings, as parcels lacked unity of ownership.

A. Camden Lewis, of Lewis, Babcock, Pleicones & Hawkins, Columbia, for appellant.

E. McLeod Singletary, Celeste T. Jones, McNair, Glenn, Konduros, Corley, Singletary, Porter & Dibble, P.A., Columbia, Charles L. Terry, III, and Donald M. Holler, Moncks Corner, for respondent.

GREGORY, Justice:

This is a condemnation action by respondent South Carolina Public Service Authority to establish a powerline easement over a tract of land owned by appellant Arnold. We affirm.

At trial Arnold sought to introduce evidence of the value of her tract if used as a limestone quarry in common with the five adjoining parcels owned by her brothers and sisters. She claimed this value should be used as the appropriate measure of compensation for the taking of her property. It is undisputed that Arnold's tract alone could not be used to extract limestone and that at the time of trial the tracts were used separately as farm or timberland. The powerline easement crosses all six parcels.

The issue presented is whether

parcels of adjoining land held by different landowners may be combined to assess the value of one landowner's property taken in a condemnation action. This Court has held that different parcels may be combined to determine severance damages after a taking only if the parcels are united in ownership, physical proximity, and use. Lewis v. South Carolina State Highway Dep't., 278 S.C. 170, 293 S.E.2d 434 (1982); South Carolina State Highway Dep't. v. Terrain, 267 S.C. 186, 227 S.E.2d 184 (1976). This same rule applies in determining the value of the property taken. Because the adjoining parcels here lack unity of ownership, they may not be combined for the purpose of increasing compensation for the land taken. See also Board of Transportation v. Martin, 296 N.C. 20, 249 S.E.2d 390

(1978); Barnes v. North Carolina State Highway Comm'n, 250 N.C. 378, 109 S.E.2d 219 (1959); 29A C.J.S. Eminent Domain §140 (1965). The trial judge properly disallowed the proffered evidence.

Accordingly, the judgment of the Circuit Court is

AFFIRMED.

NESS, C.J., HARWELL, and FINNEY, J.J., and Acting Associate Justice ALEXANDER M. SANDERS, JR., concur.

APPENDIX B

The Supreme Court of South Carolina

June 2, 1987

A. Camden Lewis, Esquire
Post Office Box 11208
Columbia, South Carolina 29211

Re: Arnold v. S.C. Public Service Authority

Dear Mr. Lewis:

The Court has refused your Petition for Rehearing in the above entitled matter in the following order:

"Petition denied.

s/ J.B. Ness C.J.
s/ George T. Gregory, Jr. A.J.
s/ David W. Harwell A.J.
s/ Ernest A. Finney, Jr. A.J.
s/ Alexander M. Sander, Jr. A.A.J.

Associate Justice Chandler not participating.

June 2, 1977."

The remitter is being forwarded to the Clerk of Court fo Berkeley County.

Sincerely yours,
Clyde N. Davis
CLERK

CND,Jr/krp

cc: Celeste T. Jones, Esquire
Charles L. Terry, III, Esquire
Donald M. Holler, Esquire

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RETURN TO PETITION FOR WRIT OF CERTIORARI
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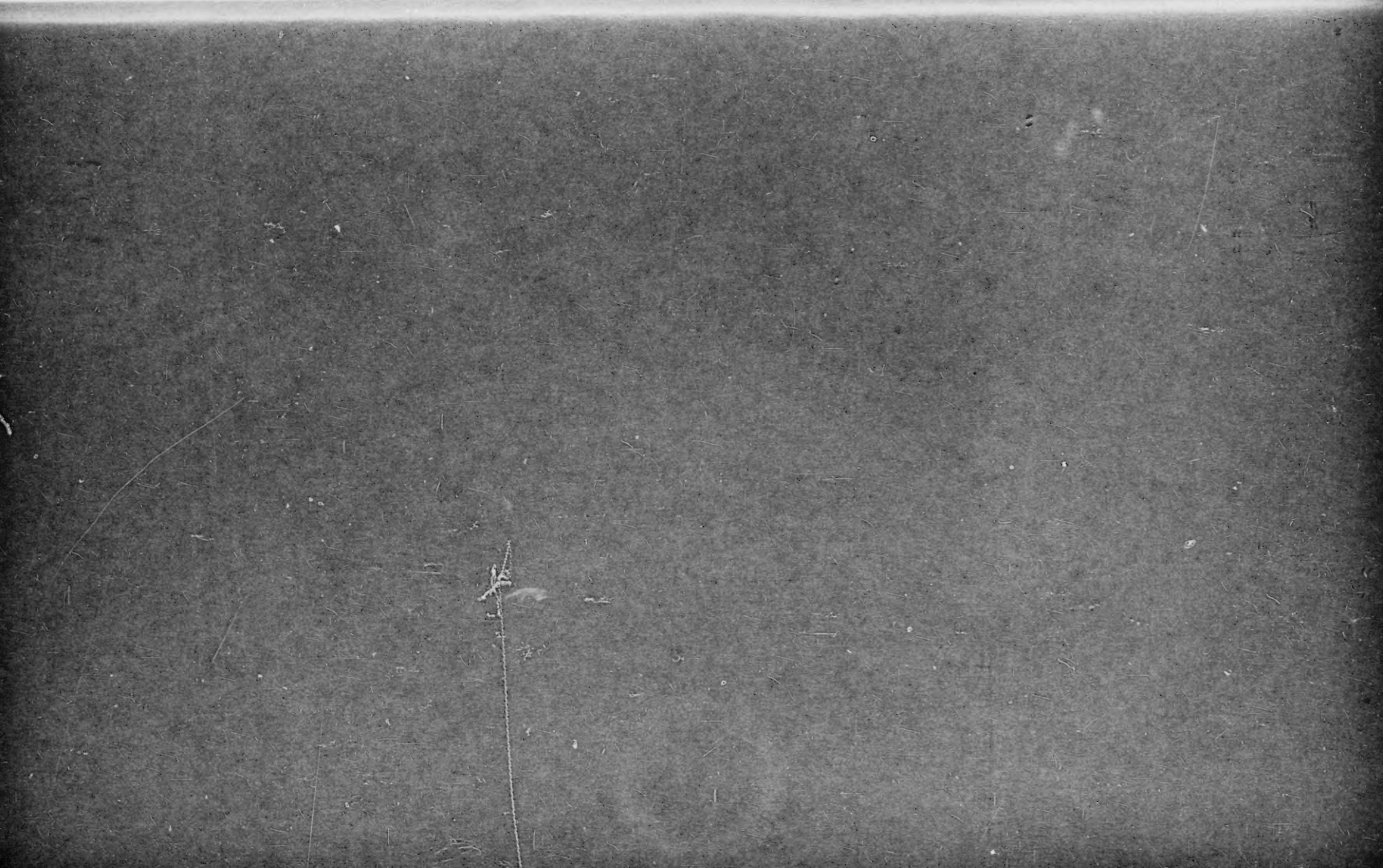

QUESTION PRESENTED

IS IT A VIOLATION OF THE CONSTITUTIONAL OBLIGATION TO PAY "JUST COMPENSATION," TO HOLD THAT THE VALUE OF PROPERTY TAKEN IN CONDEMNATION CANNOT BE VALUED IN COMBINATION WITH ADJOINING LANDS WITHOUT UNITY OF OWNERSHIP?

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28 USC §1257(3).
40 USC §258(a) - 258(e).
§28-5-90 Code of Laws of South Carolina (1976).

Rules

Rule 17.1 17.1(b) and 21.1(h) Rules of the Supreme Court of the United States

Cases

Arnold v. South Carolina Public Service Authority, _____ S.C. _____, 356 S.E.2d 837 (1987).
Barnes v. North Carolina State Highway Commission, 250 N.C. 387, 109 S.E.2d 219 (1959).
Henner v. State, 224 N.Y.S.2d 420, 32 Misc.2d 333, (1962).
Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L.Ed. 527 (1983)
Lewis v. South Carolina Highway Department, 278 S.C. 170, 293 S.E.2d 434 (1982).
Nantala Power & Light Company v. Moss, 220 N.C. 200, 17 S.E.2d 10 (1941)
Olson v. United States, 292 U.S. 54 S.Ct. 704 (1937).
Sharpe v. United States, 191 U.S. 341, 24 S.Ct. 114, 48 L.Ed. 211 (1903).
South Carolina Highway Department v. Terrain, Inc., 276 S.C. 186, 227 S.E.2d 184 (1976).
South Carolina Public Service Authority v.

Reather P. Arnold, et. al., 287 S.C. 584, 340 S.E.2d 535 (1985).

State v. Dugan, et. al., 277 S.C. 35, 282 S.E.2d 838 (1981).
State Highway Commission v. Fortune, 91 N.W.2d 675, 77 S.D. 302 (1958).
Tyson v. State Highway Commission, 249 N.C. 732, 107 S.E.2d 630 (1959).
United States v. Dow, 357 U.S. 17, 78 S.Ct. 1039, 2 L.Ed.2d 1109 (1958).
United States v. Runner, 174 F.2d 651 (10th Cir. 1949).
United States v. 2979.72 Acres, 270 F.2d 707 (4th Cir.
(1959).
United States v. 1532.63 Acres of Land, 86 F.Supp 467 (D.S.C. 1949).
United States v. 33.90 Acres of Land, 709 F.2d 1012 (5th Cir. 1983).

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South Carolina Public Service Authority, Respondent, prays that the Petition for Writ of Certiorari filed in the herein referenced case be denied on jurisdictional as well as substantive grounds.

JURISDICTION

Petitioners seek to invoke the jurisdiction of this court under 28 U.S.C. §1257(3) which provides in relevant part:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court.... (3) ... where any title, right, privilege, or immunity is specially set up or claimed under the constitution, treaties or statutes of. . . the United States.

28 U.S.C. §1257(3). (emphasis added).

The "final judgement" presented by the petitioner here for review is that the South Carolina Supreme Court's holding in Arnold v. South Carolina Public Service Authority, _____ S.C. _____ 356, S.E.2d 837 (1987, S.C.) violates the constitutional obligation to pay just compensation for lands taken in eminent domain proceedings. The petitioner argues that to hold that the value of property taken in condemnation cannot be valued in combination with adjourning lands without unity of ownership is unconstitutional. This constitutional

claim was never raised or decided in any of the South Carolina court proceedings. Thus, there is no "final judgement" rendered by the highest South Carolina court on this constitutional issue from which any appeal can lie. The exceptions taken by the petitioner (Appendix A) and the question presented by the petitioner (Appendix B) in the proceeding before the South Carolina Supreme Court raises no constitutional issue.

> A review on writ of certiorari is not a matter of right but of judicial discretion, and will be granted only when there are special and important reasons therefor....

Rule 17.1, Rules of the Supreme Court of the United States.

The function of a Writ of Certiorari by the United States Supreme Court is to correct substantial errors of law which are not otherwise reviewable, and involve a federal question. Here there is no federal question that has been reviewed by the South Carolina courts. Rule 17.1(b). Id. The decision sought to be reviewed here is one merely involving the formula or method by which land values may be determined in condemnation proceedings. This question involves no constitutional issue; none was ever presented to any South Carolina court; and none was decided by any South Carolina court. Where federal questions are not raised and passed on in the State courts, the U. S. Supreme Court will not consider the issue. Moreover, if both of the requirements that a federal

question has been raised and decided in the State court below do not appear on the record, the appellant jurisdiction of the Supreme Court fails. Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L.Ed.2d 527 (1983). Finally, Rule 21.1(h), Rules of the Supreme Court of the Unites States, provides that if review of the judgment of a state court is sought, the statement of the case should specify the stages in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised, the method or manner of raising them, and the way in which they were passed upon by the court. The statement of the case in the Petition for the Writ herein does not comply with Rule 21.1(h). Thus, there is no jurisdictional basis for review in this case and the petition must be denied.

STATEMENT OF THE FACTS

This is a condemnation action, which was originally instituted by the South Carolina Public Service Authority for the purpose of establishing a powerline easement.

The petitioner and five (5) of her siblings own six (6) contiguous tracts of land that are all crossed by respondent's powerline. Approximately 6-8 months after entry by the condemnor, the family members began investigating to determine if minable limestone existed on their properties. They discovered and it is undisputed that no one tract alone could economically support any limestone mining. The parties and the testimony were also in dispute regarding whether the six (6) tracts grouped together could establish an economically feasible

quarry site[1] and whether the tracts could be combined for the purpose of establishing the limestone mining as the highest and best use and thereby greater damages for the property.

The trial court excluded any evidence concerning combining the six tracts and this ruling was upheld by the South Carolina Supreme Court. Arnold v. S. C. Public Service Authority, supra. (1987, S.C.).

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[1] Respondent disputes petitioner's assertion that the parties agree on the combined tract being able to economically support a limestone mining site. (Petitioner's Petition at page 8.)

REASON FOR DENYING THE WRIT

Petitioner asserts that the disallowance of unification of separate and independent tracts in a condemnation proceeding violates the Fifth Amendment to the Constitution. There is no challenge regarding the underlying right to compensation. The focus here is on the method of valuation alone.

In South Carolina the law has been established for years which generally requires the unity of ownership and use, as well as physical continuity, in order for parcels to be united for the purpose of awarding damages. S.C. Hwy. Dept. v. Terrain, Inc., 276 S.C. 186, 227 S.E.2d 184 (1976). Lewis v. S.C. Hwy. Dept., 278 S.C. 170, 293 S.E.2d 434, 435 (1982).

In the Terrain case, supra, the S. C. Supreme Court held that only where parcels of land are united in ownership, physical proximity and use may a court hold

that several contiguous, but independently acquired, parcels of land constitute a single tract. Terrain, supra, 227 S.E.2d at 187; Barnes v. North Carolina State Highway Commission, 250 N.C. 387, 109 S.E.2d 219 (1959).

Moreover, in deciding the Terrain case, supra, the South Carolina Supreme Court adopted the holding in Barnes v. North Carolina State Highway Commission, supra. In Barnes the same question presently was decided by the North Carolina Supreme Court as follows:

> The parcels claimed as a single tract must be owned by the same party or parties.... Tyson v. State Highway Commission, 249 N.C. 732, 107 S.E.2d 630 ... different owners of adjoining parcels may not unite them as one tract, nor may an owner of one tract unite with his land adjoining tracts of other owners for the purpose of showing thereby greater

> damages. Nantala Power & Light Co. v. Moss, 220 N.C. 200, at 207, 17 S.E.2d 10 (1941).

Barnes v. North Carolina, 109 S.E.2d at 225. The court in Terrain, supra, applied the same principles as the North Carolina court in Barnes.

The holding of the S.C. Supreme Court here also follows that of the United States Supreme Court's decision in U.S. v. Dow, 357 U.S. 17, 78 S.Ct. 1039, 2 L.Ed.2d 1109 (1958). In Dow the United States acquired a pipeline easement over Dow's property, a 617-acre tract, pursuant to the Declaration of Taking Act of February 26, 1931, 46 Stat. 1421, 40 U.S.C. §258(a)-258(c), 40 USCA §§258(a)-258(e).[2]

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[2] Section 1 of the Declaration of Taking Act is identical to the Public Works Eminent Domain Statute, §28-5-90 Code of Laws of South Carolina (1976), involved in the present case, which provides: "Upon the filing of said declaration of taking and of the deposit in the court ... of the estimated compensation ... title ... shall

In the Dow case, supra, the United States filed its Petition in Condemnation in 1943 and immediately took possession of the land. In 1945 Mr. Dow purchased the property, and subsequently, in 1946, the government filed its Declaration of Taking and deposited into the court the estimated compensation. Dow claimed the right to the compensation as "owner," but the U.S. Supreme Court held that the owner at the time the government took possession in 1943 was the one entitled to receive payment.

The U. S. Supreme Court reasoned that the time of filing cannot ever be the time of taking where the government has already taken possession and, in dicta,

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vest in the United States ... and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation ... shall vest in the persons entitled thereto ...."

ruled that unification after entry by a condemnor cannot be had because:

> Manipulations might be encouraged which could operate to the disadvantage of either the landowner or the United States.... For instance, if a single tract of land were worth more than the sum of its component parcels, cf. United States v. Runner, 10 Cir. 174 F.2d 651, owners of adjacent condemned properties could consolidate their holdings after the governments' entry solely for the purpose of obtaining a larger award.
> We cannot attribute to Congress the intention to promulgate a rule which would open the door to such obvious incongruities and undesirable possibilities.

U.S. v. Dow, supra, 357 U.S. at 25.

The Fourth Circuit has also followed this reasoning in U.S. v. 2979.72 Acres, 270 F.2d 707 at 713 (4th Cir. 1959), where the court stated:

It is also generally held that tracts vested in different persons cannot be considered as a whole although used as one. United States v. Miller, 1943, 317 U.S. 369, 375-376, 63 S. Ct. 276, 87 L.Ed. 336, 147 A.L.R. 55; Bauman v. Ross, 1897, 167 U.S. 548, 574, 17 S. Ct. 966, 42 L.Ed. 270; United States v. Grizzard, 1911, 219 U.S. 180, 184-185, 31 S. Ct. 162, 55 L.Ed. 165, 31 L.R.A.,N.A.S. 1135; Baetjer v. United States, 1 Cir. 1944, 143 F.2d 391, 394-395, certiorari denied, 323 U.S. 772, 65 S. Ct. 131, 89 L.Ed. 618; United States v. Honolulu Plantation Co., 9 Cir. 1950, 182 F.2d 172, 176-179, certiorari denied, 1950, 340 U.S. 820, 71 S. Ct. 51, 95 L.Ed. 602; United States v. Mills, 8 Cir. 1956, 237 F.2d 401; 6 A.L.R.2d 1197; Cole Investment Co. v. United States, 9 Cir. 1958, 258 F.2d 203; McIntyre v. Board of County Com'rs, 1959, 168 Kan. 115, 211 P.2d 59; 18 Am.Jur.,

Eminent Domain, §272, p. 912.

Finally, the mere fact that owners of contiguous properties are related by blood or marriage is insufficient as a matter of law to allow the court to consider the properties as one parcel. In State Highway Commission v. Fortune, 91 N.W.2d 675, 77 S.D. 302 (1958), the court held where land which was the subject of condemnation proceedings was operated by a father and his son as a single ranch unit, but consisted of parcels owned separately by either the father or the son, that damages could not be awarded on a basis that the land constituted one parcel, due to the lack of unity in ownership of the parcels. Also, in Henner v. State, 224 N.Y.S.2d 420, 32 Misc.2d 333, (1962), the court held that although a husband and wife were tenants by entirety, in a parcel contiguous to an appropriated parcel owned by the wife alone,

and where both parcels were used jointly for a common purpose, any right of the wife for damages to the contiguous parcel could not benefit the husband.

In Olson v. United States, 292 U.S. 246, 54 S. Ct. 704 (1937), the facts are vastly distinguishable. The holding in Olson, if applicable, supports the condemnor's assertions in this appeal. In Olson, the landowner sought to increase the value of his property taken by having its value and use measured by the value of the parcel to the condemning authority when combined with the other parcels taken by the authority. The quote from the Olson opinion offered by the petitioner is taken out of context in that the issue there involved whether it was appropriate for the owner to be compensated for value to the parcel resulting from the take and usage to be implemented by the authority. The court held:

> The value to be ascertained does not include, and the owner is not entitled to compensation for, any element resulting subsequently to or because of the taking.

Olson, supra, 54 S. Ct. at 709.

> As just compensation includes no increment resulting from the taking, . . . on the facts shown, it conclusively appears that there was no element of value belonging to petitioners that legitimately could be attributed to use and adaptability of their lands for reservoir purposes. The evidence covered by petitioners' offers was inadmissible. The court rightly excluded reservoir uses from consideration.

Olson, supra, 54 S. Ct. at 711.

The South Carolina Court here held that the individually owned tracts could not be united to establish a different, highest and best use and thereby

greater damages from the highest and best use of the individual parcels. The attempt by petitioner is precisely to unify the six (6) individually owned tracts into one large tract for the purpose of increasing damages, which was disallowed in Lewis v. SCHD, 278 S.C. 170, 293 S.E.2d 434 (1982) and SCHD v. Terrain, Inc., 276 S.C. 186, 227 S.E.2d 184 (1976).

CONCLUSION

Inasmuch as the jurisdictional requirements for the granting of a petition for Writ of Certiorari have not been presented by the petitioner, and because there is no federal question wrongly decided

by the South Carolina Supreme Court in this case, the petition should be denied.

Respectfully submitted,

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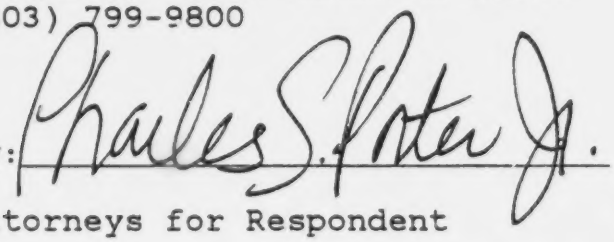
By: 

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Supreme Court, U.S.
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NO. 87-353

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

REATHER P. ARNOLD,

Petitioner,

VS.

SOUTH CAROLINA PUBLIC SERVICE AUTHORITY,

Respondent.

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

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QUESTION PRESENTED

Is it a violation of the constitutional obligation to pay "just compensation," to hold that the value of property taken in condemnation cannot be valued in combination with adjoining lands without unity of ownership?

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NO. 87-353

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REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

Reather P. Arnold, Petitioner, herein replies to Respondent's Return to the Petition for Writ of Certiorari filed by Petitioner on August 28, 1987.

JURISDICTION

Respondent asserts in its Return that this Petition for Writ of Certiorari should be denied on jurisdictional grounds because no constitutional issue is involved and none was ever presented to any South Carolina Court.

The question of whether property taken in condemnation can be valued in combination with adjoining lands without unity of ownership is fundamentally a question of "just compensation" as required by the Fifth Amendment to the Constitution of the United States.

As this Court stated recently in the case of First Evangelical Lutheran Church of Glendale v. Los Angeles County, 107 S. Ct. 2378 (1987):

> Consideration of the compensation question must begin with direct reference to the language of the Fifth Amendment, which

> provides in relevant part that 'private property [shall not] be taken for public use, without just compensation.'

Id. at 2385.

Petitioner clearly addressed the issue of "just compensation" in her Question Presented on appeal to the South Carolina Supreme Court. (Appendix A) The question before that court and the one that has remained throughout is whether a condemned piece of property can be valued in combination with adjoining properties without unity of ownership.

Furthermore, the Petition for Rehearing submitted by Petitioner to the South Carolina Supreme Court specifically states that the question before the court is one of "just compensation" as provided by the Constitution of the United States. (Appendix B)

CONCLUSION

Petitioner has met the jurisdictional requirements of 28 U.S.C. Section 1257(3) for a review by this Court on Writ of Certiorari.

Therefore, for the reasons stated in the Petition for Writ of Certiorari filed by Petitioner with this court on August 28, 1987, Writ of Certiorari should be granted.

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(Appendices follow)

APPENDIX A

QUESTION PRESENTED IN THE
BRIEF OF APPELLANT ON APPEAL TO
THE SOUTH CAROLINA SUPREME COURT:

QUESTION PRESENTED

CAN A CONDEMNED PIECE OF PROPERTY BE CONSIDERED IN COMBINATION WITH ADJOINING PROPERTIES FOR DETERMINING HIGHEST AND BEST USE? (Exceptions 1, 2, 3 and 4)

APPENDIX B

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Reather P. Arnold,

Appellant

-v- South Carolina Public Service Authority,

Respondent

Appeal from Berkeley County

Frank P. McGowan, Jr., Judge

Opinion No. 22711

Heard March 24, 1987 -

- Filed April 27, 1987

PETITION FOR REHEARING

TO: The South Carolina Supreme Court

The Appellant respectfully petitions the Court for a rehearing in the above captioned case in that the

Court has overlooked or misapprehended the points below:

1. The question before the Court is not an evidentiary question but a question of "just compensation" as provided for in both the South Carolina Constituion and the Constituion of the United States.

2. The Court failed to recognize the guiding principle in determining "just compensation" as set forth by the United States Supreme Court in Olson v. United States, 292 U.S. 246 (1934):

> Just Compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined. The sum required to be paid the owner does not depend upon the uses to which he has devoted his land but is to be arrived at upon just consideration of all the uses for which it is suitable. The highest and most profitable use of which the property is adaptable and

> needed or likely to be needed in the reasonably near future is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held. Boom Co. v. Patterson, 98 U.S. 403, 408. Clark's Ferry Bridge Co. v. Public Service Comm's., 291 U.S. 227 2 Lewis, Eminent Domain, 3d ed., §707, p. 1233. 1 Nicholas, Eminent Domain 2d ed. §220, p. 671. The fact that the most profitable use of a parcel can be made only in combination with other lands does not necessarily exclude that use from consideration if the possibility of combination is reasonably sufficient to affect market value. (Emphasis added)

3. The Court has in effect improperly overruled its own decision of City of Orangeburg v. Buford, 227 S.C. 280, 87 S.E.2d 822 (1955) wherein it states:

> The landowner was entitled to compensation upon the basis of most advantageous

and profitable use of her land. In estimating the value of property condemned, all of the uses to which it may be applied, or for which it is adapted, which affect its value in the market, are to be considered, and not merely the condition it is in at the time and the use to which it was then applied by the owner. Nathahala Power & Light Co. v. Moss, 220 N.C. 200, 17 S.E.2d 10; 18 AM. Jr., Eminent Domain, Section 244. It is true that the improvements on the property condemned were to be made in conjunction with those on adjacent property but 'the fact that the most profitable use of a parcel can be made only in combination with other lands does not necessarily exclude that use from consideration if the possibility of combination is reasonably sufficient to affect market value.' Olson v. United States, 292 U.S. 246, 54 S.Ct., 704, 709 78 L.Ed. 1236. (Emphasis added)

4. The Court has failed to recognize that the application of unity of ownership only applies when there is

an attempt to apply severence damages to more than one tract of land. Under the Constitutional requirement of "just compensation" unity of ownership can not apply to the valuation of the land taken; in the case of the land taken the landowner is entitled to compensation upon the basis of the most advantageous and profitable use of his land, to include valuation in combination with other lands.

Respectfully submitted,

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